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No. 83-1223

in the Supreme Court of the United States

October Term, 1983

WHIRLPOOL CORPORATION,
Petitioner,

vs.

WILFRED H. VANCE,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

STATEMENT OF THE CASE 1

THIS COURT SHOULD GRANT THE PETITION AND CROSS-PETITION FOR A WRIT OF CERTIORARI.

I. THE FOURTH CIRCUIT CORRECTLY RULED THAT THE STATUTE OF LIMITATIONS OF §626(e) OF THE ADEA SHOULD BE EQUITABLY TOLLED .. 5

II. THE COURT OF APPEALS PROPERLY CONSIDERED THE QUESTION OF WHETHER THE 180-DAY REQUIREMENT OF §626(d) OF THE ADEA MAY BE EQUITABLY TOLLED 8

III. THE FOURTH CIRCUIT DECISION PROVIDING FOR EQUITABLE TOLLING OF THE 180-DAY WAITING PERIOD OF §626(d) OF THE ADEA IS IN ACCORD WITH THE DECISIONS OF THIS COURT AS WELL AS THE DECISIONS OF EVERY OTHER COURT OF APPEALS CONSIDERING THE QUESTION 12

CONCLUSION 16

TABLE OF AUTHORITIES

Cases	Pages
Bell v. Hood, 327 U.S. 678 (1946)	9, 11
Bonham v. Dresser Industries, Inc., 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 439 U.S. 821 (1978)	13, 14
Bush v. State Industries, Inc., 599 F.2d 780 (6th Cir. 1979)	9, 11
Coke v. General Adjustment Bureau, Inc., 616 F.2d 780, 790 (5th Cir. 1980)	7
Coke v. General Adjustment Bureau, Inc., 640 F.2d 584 (5th Cir. 1981) (en banc)	11
Cannon v. University of Chicago, 559 F.2d 1063 (7th Cir. 1976), *reversed and remanded*, 441 U.S. 677 (1978)	5, 6
Dartt v. Shell Oil Co., 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided court*, 434 U.S. 99 (1977), *reh. denied*, 434 U.S. 1042 (1978)	13, 14
Dry Creek Lodge, Inc. v. United States, 515 F.2d 926 (10th Cir. 1975)	11
Firestone Tire and Rubber Co. v. Risjord, 449 U.S. 368 (1980)	11

TABLE OF AUTHORITIES (Continued)

Cases	Pages
Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959)	6, 7
Kephart v. Institute of Gas Technology, 581 F.2d 1287 (7th Cir. 1978)	13, 14
Naton v. Bank of California, 649 F.2d 691 (9th Cir. 1981)	7, 11
Nielson v. Western Electric Co., 603 F.2d 741 (8th Cir. 1979)	13
Reich v. Dow Badische Co., 575 F.2d 363 (2nd Cir.), *cert. denied*, 439 U.S. 1009 (1978)	5, 6
Wilkerson v. Siegfried Insurance Agency, 61 F.2d 1042, 1045 (10th Cir. 1980)	8
Wright v. State of Tennessee, 628 F.2d 949 (6th Cir. 1980) (en banc)	11
Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982)	11

TABLE OF AUTHORITIES (Continued)

Cases	Pages
STATUTES	
28 U.S.C. §§1291, 1292 and 1294	10, 11
28 U.S.C. §1331	8
29 U.S.C. §626	6, 7, 8, 10, 12, 14, 16
29 U.S.C. §627	13
29 U.S.C. §633	6
29 C.F.R. §850.10	13

STATEMENT OF THE CASE

On May 3, 1977, Wilfred H. Vance was fired by Whirlpool from his job as a territory manager for the Builder Department of the Charlotte Sales Division and replaced by a 34 year old man. Vance was ostensibly fired for violating the Whirlpool conflict of interest policy. In fact, Vance's immediate superior testified that he had been ordered by Whirlpool to "get rid of Vance and get younger blood in the organization."

Whirlpool refused to post the ADEA poster advising employees of their rights under the Age Discrimination Act even though it was aware of the existence of the Act and the regulations of the Department of Labor promulgated thereunder. (App. A at A3, A7). By the time Whirlpool finally posted the statutorily required notice, Congress had changed the upper age limit of the protected age bracket from age 65 to age 70. In fact, defendant waited more than one year and eight months after the first charge of age discrimination was filed against it in its Charlotte office to post an ADEA poster. (App. A at A7). This posting occurred more than two years and three months after Vance had been fired by Whirlpool. (App. A at A7). Whirlpool did not advise Vance of any rights that he might have under the Age Act, or even inform him of the existence of the Act.

As a result of defendant's misconduct, plaintiff was completely unaware of his rights under the Age Act at the time of his discharge in May of 1977. (App. A at A4, App. B to Petition at A19) In October of 1978, Vance visited an employment agency. In reviewing his

employment history, a person at the employment agency suggested that he contact the Department of Labor. Vance contacted the Department of Labor and was informed that "if you're going to do anything, you have to do it within a six month period of time, we can't help you." Consequently, Vance dismissed the matter and went about his work. (App. B to Petition at A20) However, in April of 1979, an accountant reviewing Vance's tax returns told him that he might have some rights under the Age Discrimination Act and suggested that he contact an attorney. Vance contacted his present attorneys in April of 1979, and for the first time became aware of any rights under the Age Discrimination Act. (App. A at A4, App. B to the Petition at A20).

By the time Vance obtained actual knowledge of his rights under the Act, it was impossible for him both to file his lawsuit within the two year statute of limitations period for nonwillful violations of the Act and to file a charge with the Secretary of Labor sixty days prior to filing suit. (App. A at A4). Vance, due to the malfeasance of defendant, was forced to choose between satisfying the sixty day notice period of §626(d) or the two year statute of limitations period of 29 U.S.C. §626(e). (App. A at A4). He elected to file his lawsuit within the statute of limitations period, and also to request the Secretary of Labor to attempt conciliation with Whirlpool. (App. A at A4). Accordingly, Vance filed his charge on April 30, 1979 and filed his lawsuit on May 1, 1979.

On May 3, the Charlotte Area Director of Labor wrote Whirlpool informing it of the charge and setting a conference for May 10, 1979. (App. A at A4). Defendant failed to attend this initial conference and subsequently

informed the Department of Labor on June 12, 1979, that it would not engage in any conciliation efforts because plaintiff's claim under the ADEA was barred by the two year statute of limitations period of 29 U.S.C. §626(e). (App. A at A4). Whirlpool contended at that time and even throughout the trial of the case, that although Vance was fired on May 3, 1977, the firing "related back" to the day he was suspended, April 22, 1977. (App. A at A4-5).

Whirlpool had been aware of allegations of age discrimination in its Charlotte office since a charge of age discrimination was filed by Colombo A. Spagnuolo, its builder sales manager, in December of 1977. Whirlpool also refused to conciliate concerning that charge. (App. A at A5, A7).

Subsequent to the filing of his complaint, Vance moved the district court to stay the action for sixty days in order to allow defendant to engage in conciliation if it desired to do so. The court ruled that there was no need to stay the action since the case would not be reached for trial for approximately one year, but instead, ordered the parties to engage in conciliation if defendant desired. (App. A at A2).

The case came on for trial before the district court and a jury on March 27, 1981. Both the court and the jury found that Vance filed his charge of age discrimination with the Secretary of Labor within 180 days of retaining a lawyer or obtaining actual knowledge of his rights under the Act. (App. A at A2, A4, App. B at B1-2). The court further found that Whirlpool's asserted reason for refusing to conciliate (namely, that Vance's charge

and lawsuit were filed outside the statute of limitations period) was illegitimate, and that Whirlpool, in fact, had no intention of engaging in conciliation. (App. A at A5). The court also found that Whirlpool suffered no prejudice by Vance's inability to give the Secretary of Labor sixty days in which to conciliate the action because it was already aware of allegations of age discrimination in its Charlotte office due to a charge of age discrimination filed against it in December of 1977 and because both the Secretary of Labor and the court afforded Whirlpool a full and fair opportunity to conciliate Vance's charge if it really desired to do so. (App. A at A7-8, A9).

The district court entered an order, based upon the jury verdict and upon its own independent findings, holding that the 180 day notice period of §626(d) of the Act was equitably tolled until April of 1979. (App. A at A8). The court further ruled that Whirlpool was equitably estopped from asserting the 60 day time period of §626(d) of the Act due to its own failure to comply with its statutory duty to make Vance aware of his rights under the Act, and that in any event, there was sufficient compliance with the 60 day notice period to accomplish the statutory purpose of that section due to the fact that Whirlpool was already aware of allegations of age discrimination in its Charlotte office and because Whirlpool was afforded a full opportunity to conciliate the charge of age discrimination both by the Department of Labor and by the district court. (App. A at A8-9). Accordingly, the district court ruled that it had jurisdiction and proceeded to enter a judgment predicated upon the jury verdict. (App. B at B1-4).

THIS COURT SHOULD GRANT BOTH THE CROSS-PETITION AND THE ORIGINAL PETITION FOR A WRIT OF CERTIORARI.

Respondent, Wilfred H. Vance, has cross-petitioned this Court to grant a writ of certiorari to review the holding of the Fourth Circuit that the 60 day notice period of §626(d) of the ADEA is a jurisdictional prerequisite to the maintenance of a lawsuit, and is not subject to equitable modification due to the acknowledged misconduct of Whirlpool. Accordingly, respondent respectfully urges the Court to grant certiorari on both the petition and the cross-petition. Nevertheless, respondent will respond to arguments in the original petition which it believes are not well taken.

I.

THE FOURTH CIRCUIT CORRECTLY RULED THAT THE STATUTE OF LIMITATIONS OF §626(e) OF THE ADEA SHOULD BE EQUITABLY TOLLED.

The decision of the Fourth Circuit that a statute of limitations may be equitably modified is in accord with prior decisions of other circuits and of this Court. Whirlpool incorrectly cites two circuit court opinions, *Reich v. Dow Badische Co.*, 575 F.2d 363 (2nd Cir.) *cert. denied*, 439 U.S. 1009 (1978); *Cannon v. University of Chicago*, 559 F.2d 1063 (7th Cir. 1976), *reversed and remanded*, 441 U.S. 677 (1978), for the proposition that the statute of limitations of §626(e) of the ADEA may not be tolled when a plaintiff has failed to comply with the 60 day notice period of §626(d) of the Act. However, neither the *Reich* nor the *Cannon* court was even

presented with the question of the effect of a plaintiff's failure to comply with the 60 day notice period of §626(d) of the Act. In *Cannon* the court of appeals merely affirmed the ruling of the district court that the complaint of a 39 year old plaintiff, who was not in the protected age bracket and was not an employee of the defendant, failed to state a claim upon which relief could be granted. In *Reich* the court of appeals held that the 180 day notice period of §626(d) and the 60 day notice period of §633 of the ADEA were subject to equitable modification, but that the plaintiff had demonstrated no basis for equitable relief. In neither case did the plaintiff claim nor demonstrate any grounds for equitable relief. In fact, the *Reich* court specifically noted:

> Cases have, indeed, granted relief against non-compliance where circumstances have been presented that indicate that the interests of justice require that equitable relief. But appellant makes out no claim entitling him to such relief. Appellant made no reference to any circumstance explaining his delayed filing. . . 575 F.2d at 37.

It is well established that equitable modification of a limitations period is appropriate when misleading or illegal conduct of the defendant has induced the plaintiff to delay asserting his rights. This principal was enunciated by this Court in *Glus v. Brooklyn Eastern District Terminal*, 359 U.S. 231 (1959), in holding that a

defendant was equitably estopped from asserting a limitations period:

> To decide this case we need to look no further than the maxim that no man may take advantage of his own wrong. Deeply rooted in our jurisprudence, this principal has been applied in many diverse classes of cases by both law and equity courts and has frequently been employed to bar inequitable reliance on statutes of limitations. 359 U.S. at 232-33.

This Court noted that "the general doctrine is well understood and is applied by courts of law as well as equity when the technical advantage thus obtained is set up and relied upon to defeat the ends of justice." 359 U.S. at 233.

Several courts of appeals have ruled that the 180 day limitations period of §626(d) of the ADEA may be equitably modified or tolled when misleading or illegal conduct on the part of an employer has caused the employee to delay asserting his rights under the Act. The Fifth Circuit stated in *Coke v. General Adjustment Bureau, Inc.*, 616 F.2d 780, 790 (5th Cir. 1980), that "perhaps in no circumstances is equitable tolling of a time limitation more justified than where a defendant, through misleading conduct, has induced a plaintiff to delay filing suit until the limitations period has run." The Ninth Circuit held in *Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981), that equitable modification of the limitations periods of the ADEA is appropriate when misleading conduct of the defendant has induced the plaintiff to fail to comply with the limitations period.

Similarly, the Tenth Circuit in *Wilkerson v. Siegfried Insurance Agency*, 61 F.2d 1042, 1045 (10th Cir. 1980), noted that action by an employer which misleads an employee and causes him to fail to comply with the requirements of §626 of the ADEA is a factor to be considered in connection with equitable tolling or estoppel.

Thus, the Fourth Circuit correctly decided that in the case at bar the limitations period of §626(e) of the ADEA should be equitably tolled in order to allow Vance to refile his complaint in the district court. Any other result would have rewarded Whirlpool for its intentional, illegal conduct in failing to post the statutorily required ADEA poster. Whirlpool should not benefit from its refusal to advise its employees of their rights under the Act, even though it was aware of the existence of the Act and the regulations of the Department of Labor promulgated thereunder. (App. A at A7)

II.

THE COURT OF APPEALS PROPERLY CONSIDERED THE QUESTION OF WHETHER THE 180-DAY REQUIREMENT OF §626(d) OF THE ADEA MAY BE EQUITABLY TOLLED.

The parameters of federal jurisdiction are defined by the Constitution and laws of the United States. Under 28 U.S.C. §1331, the United States district courts have original jurisdiction of all civil actions arising under the Constitution, laws or treaties of the United States. 28 U.S.C. §1331. Jurisdiction granted to the district court by Section 1331 is mandatory. Where the plaintiff's complaint is drawn so as to seek recovery

directly under the Constitution or the laws of the United States, the federal court must entertain the suit unless the alleged federal claim clearly appears either to have been made solely for the purpose of obtaining jurisdiction or to be wholly insubstantial and frivolous. *Bell v. Hood*, 327 U.S. 678 (1946); *Bush v. State Industries, Inc.*, 599 F.2d 780 (6th Cir. 1979).

There is no dispute that Vance's claim arises under federal law. Vance specifically alleged in his complaint, and Whirlpool admitted in its answer, that relief was sought under the ADEA:

> 1. Plaintiff is a former employee of the defendant and brings this action under the Age Discrimination In Employment Act of 1967 (29 U.S.C. §621 *et. seq.*), hereinafter referred to as the "ADEA", to secure reinstatement to his former position as an employee of the defendant and to secure full restitution of all lost wages and benefits resulting from the defendant's violation of the provisions of Section 4 of the ADEA and of Section 15(a)(2) of the Fair Labor Standards Act of 1938, as amended. (29 U.S.C. §201 *et. seq.*), hereinafter referred to as the "FLSA," and for such other and further relief as may be appropriate. (Paragraph 1 of complaint).

In addition, no claim is made that the allegations of Vance's complaint are frivolous. Vance was fired by Whirlpool on May 3, 1977, despite his superior sales performance; he was replaced by a 34 year old man; and his immediate supervisor testified that he had

been ordered by Whirlpool to "get rid of Vance and get younger blood in the organization." The case came on for hearing before the district court and a jury, and both independently found that Whirlpool willfully violated the provisions of the ADEA with respect to Vance's firing. Judgment was entered by the district court predicated upon the jury verdict and the independent findings of the court sitting in equity. (App. B at B1-4). From this final judgment, Whirlpool appealed.

The United States Court of Appeals for the Fourth Circuit has jurisdiction of appeals from all final decisions entered by district courts within the circuit. 28 U.S.C. §1291; 28 U.S.C. §1294. All points of error assigned by the defendant were brought before the court for hearing. On May 10, 1983, an opinion was filed by the court of appeals in which it found that the 60-day waiting period of 29 U.S.C. §626(d) could not be equitably tolled. Having so held, the court of appeals vacated the district court judgment and dismissed Vance's claim with leave to refile his action. Plaintiff filed a Petition for Rehearing asking, *inter alia*, that the court consider and dispose of other matters raised by the appeal. In a supplemental opinion, the court held that the 180-day filing period of 29 U.S.C. §626(d)(1) could be equitably tolled.

Whirlpool contends that the court of appeals was without power to consider the other questions raised by the parties once it decided that the 60-day notice period was not subject to equitable modification. Vance has cross-petitioned this Court for a writ of certiorari to review the Fourth Circuit's ruling that the 60-day notice period cannot be equitably modified. However, assuming *arguendo* that the court of appeals was correct

in its ruling, its decision with respect to that issue did not deprive it of the power to dispose of the other questions properly presented in the appeal. Once the plaintiff has made a claim for recovery under a federal law, and a final decision on that claim is properly brought before the court of appeals, a ruling against the plaintiff on one issue does not deprive the court of jurisdiction to decide other issues properly raised. *Bell v. Hood, supra; Bush v. State Industries,Inc., supra; Dry Creek Lodge, Inc. v. United States*, 515 F.2d 926 (10th Cir. 1975).

Whirlpool's reliance on *Firestone Tire and Rubber Co. v. Risjord*, 449 U.S. 368 (1980), is misplaced. In *Firestone*, the appellant sought to appeal to the court of appeals from an interlocutory order entered in the case. The instances in which such orders may be properly appealed are restricted by 28 U.S.C. §1292. This Court found that the order appealed from did not fall within the narrow parameters of Section 1292. Consequently, this Court held that the court of appeals had no jurisdiction to hear any appeal from such an order. By contrast, *final* decisions were appealed to the Fourth Circuit in this case, and the Fourth Circuit clearly had jurisdiction to dispose of the questions raised on appeal under 28 U.S.C. §1291.

The question of whether the 180-day period may be equitably tolled was properly raised by the defendant on appeal. Both parties briefed and argued the issue before the court. (App. A to Petition at A14, fn. 7). Having provided both of the parties with ample opportunity to be heard on the matter, the court, in an appropriate exercise of its appellate jurisdiction, disposed of the question. The court specifically noted "that the

interests of efficiency and conservation of judicial resources would best be served by our disposition of this issue." (App. B to Petition at A16) Refusal to consider the question would have served only to encourage a piecemeal appeals process abhorred by Congress and the Judiciary.

III.

THE FOURTH CIRCUIT DECISION PROVIDING FOR EQUITABLE TOLLING OF THE 180 DAY WAITING PERIOD OF §626(d) OF THE ADEA IS IN ACCORD WITH THE DECISIONS OF THIS COURT AS WELL AS THE DECISIONS OF EVERY OTHER COURT OF APPEALS CONSIDERING THE QUESTION.

On appeal Whirlpool contended that the 180 day notice provision of §626(d) of the ADEA was not subject to equitable tolling despite Whirlpool's admitted willful violation of its statutory duty to post a poster advising employees of their rights under the ADEA. In its supplemental opinion the Fourth Circuit ruled that "the 180 day requirement of 29 U.S.C. §626(d)(1) may be equitably tolled where circumstances warrant." (App. B to Petition at A19) The Fourth Circuit's opinion was predicated upon the decision of this Court in *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982), as well as the decisions of every other circuit court of appeals that has considered the question. *See Naton v. Bank of California*, 649 F.2d 691 (9th Cir. 1981); *Coke v. General Adjustment Bureau, Inc.*, 640 F.2d 584 (5th Cir. 1981) (*en banc*); *Wright v. State of Tennessee*, 628 F.2d 949

(6th Cir. 1980) (*en banc*); *Nielson v. Western Electric Co.*, 603 F.2d 741 (8th Cir. 1979); *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977), *cert. denied*, 429 U.S. 821 (1978); *Dartt v. Shell Oil Co.*, 539 F.2d 1256 (10th Cir. 1976), *aff'd by equally divided court*, 434 U.S. 99 (1977), *reh. denied*, 434 U.S. 1042 (1978).

The ADEA imposes a mandatory obligation upon an employer "to post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter." 29 U.S.C. §627. Regulations published by the Department of Labor require the notice to be posted in prominent and accessible places where it can be readily observed by employees. 29 C.F.R. §850.10. As the Fourth Circuit noted in its opinion, "At the time of [Vance's] discharge and for over two years thereafter, no notice was posted in Whirlpool's Charlotte sales office setting forth information regarding the rights of employees under the ADEA as required under 29 U.S.C. §627." (App. A to Petition at A2-A3). Whirlpool failed to comply with its statutory duty even though it was aware of the existence of the Act and the regulations of the Department of Labor promulgated thereunder. (App. A at A3).

As a result of Whirlpool's violation of the law, plaintiff was completely unaware of his rights under the ADEA at the time of his discharge in May of 1977 and did not become aware of his rights until April of 1979. (App. B to Petition at A19, App. A at A4). Under

such circumstances, the Fourth Circuit correctly ruled that the 180 day notice period of §626(d) was tolled by reason of Whirlpool's failure to post the statutory notice, and that the period did not begin to run until such time as Vance acquired actual knowledge of his rights or retained an attorney. (App. B to Petition at A19). *Accord, Kephart v. Institute of Gas Technology*, 581 F.2d at 1289; *Bonham v. Dresser Industries, Inc.*, 569 F.2d at 193; *Dartt v. Shell Oil Co.*, 539 F.2d at 1260. Any other result would leave employers free to breach the posting requirement without penalty, and indeed, would encourage employers to do so because an employee who is unaware of his rights would not be able to file a charge within 180 days of the discriminatory act.

The decisions of other circuits cited by Whirlpool in its petition are not in point. In each of those cases, the employee was already aware of his rights under the ADEA at the time of his discharge, notwithstanding the employer's failure to post the required age poster. In the present action, Vance, due to the willful, illegal conduct of Whirlpool, was completely unaware of his age rights at the time of his firing. In October of 1978, more than a year and a half after he was fired, he saw an age poster at an employment agency. He immediately contacted the Department of Labor, but was advised that his claim was time-barred due to the 180 day notice period. (App. B to Petition at A20). It was not until April of 1979 that Vance, upon the advice of a friend, contacted an attorney and became aware of his rights under the Act. (App. B to Petition at A20). The

Fourth Circuit noted this important distinction in its opinion:

> Here, however, the period had already run when Vance saw the notice, and in our opinion he acted reasonably in assuming that his claim was barred, especially in view of the advice which he received from the employee of the Department of Labor. Under these circumstances, we think the district court acted properly in submitting to the jury the question whether Vance filed his charge with the Secretary within 180 days from the time he retained a lawyer or obtained actual knowledge of his rights under the ADEA. Since the jury found in its special verdict that Vance had filed a timely charge, and its finding is supported by substantial evidence in the record, the district court acted properly in holding that the 180-day filing period had been tolled until April of 1979. (App. B to Petition at A20).

Clearly, Vance did not gain actual knowledge of his rights until he retained an attorney in April of 1979, almost two years prior to filing his charge with the Secretary of Labor. Accordingly, the Fourth Circuit was correct in upholding the ruling of the district court that the 180 day notice period was equitably tolled until April of 1979.

CONCLUSION

This Court should grant the Cross-Petition and Petition for Writ of Certiorari in order to decide whether the 60-day notice period of §626(d) of the ADEA is a jurisdictional prerequisite to the maintenance of an action or is in the nature of a limitations period and subject to equitable modification. While petitioner's contentions have little merit, they understandably arise from the confusing state of the law in the circuits resulting from the application of the term "jurisdictional" to the 60-day "limitations" period of §626(d). Accordingly, this Court should decide whether in all instances a failure by a plaintiff in a case under the ADEA to comply with the 60-day period of §626(d) is "jurisdictional" in the sense that it deprives the federal courts of all power to act on the matter.

Respectfully submitted,

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Appendix

[FILED MAY 29 1981]

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. C-C-79-140

WILDRED H. VANCE,

Plaintiff,

vs.

WHIRLPOOL CORPORATION,

Defendant.

ORDER

This is an action under the Age Discrimination in Employment Act, which was tried before this Court and a jury beginning on March 27, 1981 and ending April 2, 1981, when plaintiff received a jury verdict in his favor on all issues.

Defendant earlier moved for summary judgment on the grounds that plaintiff had failed to comply with the notice requirements of 29 U.S.C. §626(d). That section requires a plaintiff to file a charge of age discrimination with the Secretary of Labor within 180 days of the alleged discriminatory act and at least 60 days prior to

filing suit. This Court concluded that the two notice periods provided for in §626(d) of the Act were not jurisdictional, but rather were subject to modification due to equitable considerations, and that genuine issues of fact remained to be determined in order for the Court to decide whether to exercise its equitable jurisdiction to toll the two times periods. Accordingly, defendant's motion for summary judgment was denied.

At the hearing on the motion for summary judgment on April 9, 1980, plaintiff's attorneys moved the Court to stay the action for 60 days in order to allow defendant to engage in conciliation if it so desired. The Court noted that there was no need to stay the action as the case would not be reached for trial for a period far in excess of 60 days, and instead, directed the parties to get together to attempt to conciliate the matter if defendant so desired. Thereafter, the parties engaged in substantial efforts to settle the case, but were unable to reach an accommodation, and accordingly, the matter came on for trial before this Court and a jury on March 27, 1981.

Three factual issues relating to the question of equitable tolling were submitted to the jury and the jury verdict was as follows:

1. Did defendant Whirlpool fail to post and keep posted in conspicuous places upon its premises in Charlotte an age discrimination notice or notices prepared as approved by the Secretary of Labor setting forth information to employees regarding their rights under the Age Discrimination Act?

   ANSWER: Yes

2. Did the plaintiff Wilfred Vance file a charge of age discrimination with the Secretary of Labor within 180 days of retaining a lawyer or obtaining actual knowledge of his rights under the Age Discrimination in Employment Act?

   ANSWER: Yes

3. Did the defendant Whirlpool Corporation refuse to conciliate with the Department of Labor concerning the plaintiff's charge of age discrimination?

   ANSWER: Yes

The Court, based upon the jury verdict, and sitting as a Court of equity independent of the jury, finds the facts hereinafter set forth.

Plaintiff was discharged from his job with defendant on May 3, 1977 and his age was a causative or determining factor in defendant's decision to discharge him. Defendant's discriminatory conduct towards plaintiff was willful and plaintiff's discharge was not effected in good faith. Defendant failed to post and keep posted any posters on its premises in Charlotte setting forth information to employees regarding their rights under the Age Discrimination Act even though it knew of the requirements of the Act that such notice should be conspicuously posted on its premises. In fact, defendant waited more than one year and eight months after the first charge against it alleging age discrimination in its Charlotte office to post the statutorily required notice.

As a result of defendant's failure to post an age discrimination notice, plaintiff was ignorant of his rights under the Age Act and did not become aware of such rights until April of 1979 when he retained his present attorneys. However, at that time, plaintiff and his attorneys were on the horns of a dilemma. The two year statute of limitations for nonwillful violations of the Act set forth in 29 U.S.C. §255(a), and incorporated into the Age Act by 29 U.S.C. §626, would expire on May 2, 1979. Therefore, it was impossible for plaintiff to file his lawsuit within the two year statute of limitations period and still file a charge with the Secretary of Labor 60 days prior to filing the suit. Plaintiff, through no fault of his own, had to choose between satisfying the 60 day notice period of §626(d) or the two year statute of limitations period of §255(a). He chose the latter. Plaintiff sent his charge of age discrimination to the Department of Labor on April 30, 1979, and the charge was received by a representative of the Department of Labor on May 1, 1979. Plaintiff filed his complaint on May 1, 1979.

Notwithstanding the filing of the lawsuit, the Secretary of Labor attempted to conciliate plaintiff's charge of age discrimination. On May 3, Fred Carlock, the Charlotte Area Director of the Department of Labor, wrote defendant informing it of the charge and setting a conference for May 10, 1979. Defendant refused to attend this initial conference and subsequently informed the Department of Labor on June 12, 1979 that it would not engage in any conciliation efforts because plaintiff's charge of age discrimination was outside the two year statute of limitations period. (Defendant contended that even though plaintiff was first notified of his discharge on May 3, 1977, the discharge "related

back" to April 22, 1977). The Court concludes that defendant's asserted reason for refusing to conciliate was illegitimate, and that defendant, in fact, had no intention of conciliating the charge. The Court is cognizant of the fact that defendant had earlier refused to engage in conciliation concerning a charge of age discrimination in its Charlotte office filed on January 3, 1978 by Colombo A. Spagnuolo. A jury and this Court subsequently found that Whirpool had willfully engaged in age discrimination against Spagnuolo.

I conclude that the 180 day and the 60 day notice period as set forth in §626(d) are not jurisdictional, but are in the nature of statutes of limitations and therefore are subject to equitable modification. (See *Kephart v. Institute of Gas Technology*, 581 F.2d 1287 (7th Cir. 1978); *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187 (3rd Cir. 1977); *Dartt v. Shell Oil Company*, 539 F.2d 1256 (10th Cir. 1976) aff'd by an equally divided court, 434 U.S. 99 (1977); *Nielsen v. Western Electric Company, Inc.*, 603 F.2d 741 (8th Cir. 1979); *Charlier v. S. C. Johnson and Son, Inc.*, 556 F.2d 761 (5th Cir. 1977); *Rucker v. Great Scott Super Markets*, 528 F.2d 393 (6th Cir. 1976); *Bishop v. Jelleff Associates*, 398 F.Supp. 579 (D.D.C. 1974)). In reaching such conclusion, I am mindful that the ADEA is "remedial and humanitarian legislation which should be liberally interpreted to effectuate the Congressional purpose of ending age discrimination in employment." (See *Bonham*, supra, at 193; *Kephart*, supra, at 1288; and *Dartt*, supra, at 1260). This construction of §626 is also endorsed by Congress, as the legislative history of the 1978 Amendments to the Act contains

the following explanation of the charge requirements of §626:

> The conferees agree that the "charge" requirement is not a jurisdictional prerequisite to maintaining an action under the ADEA and therefore equitable modification for failing to file within the time period will be available to plaintiffs under this Act. Legislative History, P.L. 95-256, Joint Explanatory Statement of the Committee of Conference, U.S. Code Cong. and Admin. News 1978, p. 528.

Congress also specifically granted to the District Court the power "to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this Chapter." 29 U.S.C. §626(b).

Section 627 of the Act provides:

> "Every employer . . . shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this Chapter.

Clearly, Congress imposed this requirement on employers to insure that employees within the protected age group would be fully informed of their rights under the Act. It is equally clear that this end would not be met if employers were free to breach the posting requirement without penalty. Accordingly, I conclude that the 180 day notice limitation of §626(b) is tolled by the defendant's failure to post conspicuously on its premises notice of

ADEA rights and that such period began to run in April of 1979 when the plaintiff retained an attorney and acquired actual knowledge of his rights under the Act. (*Kephart*, supra, at 1289; *Dartt*, supra, at 1260; *Bonham*, supra, at 193).

I conclude that plaintiff's failure to wait 60 days after filing a charge with the Secretary of Labor to commence his lawsuit should also be excused. Plaintiff was forced to take such a course by defendant's own acts and omissions in failing to make plaintiff aware of his rights under the Act. Defendant's actions are particularly reprehensible because evidence adduced at the trial of this cause demonstrated that defendant was aware of the provisions of the Age Discrimination Act at the time of plaintiff's discharge. Defendant's cavalier attitude towards its statutory duty is evidenced by the fact that it did not post an age notice in its Charlotte office until one year and eight months after it first received a charge of age discrimination by one of its employees, and more than two years and three months after the plaintiff in this action was discharged.

Defendant suffered no prejudice by plaintiff's inability to give the Secretary 60 days in which to conciliate the action. Defendant was already aware of allegations of age discrimination in its Charlotte office by virtue of Spagnuolo's charge of age discrimination filed with the Secretary of Labor in January of 1978 and his lawsuit filed in this Court in March of 1978. The Secretary of Labor afforded defendant an opportunity to conciliate plaintiff's charge, but defendant refused to do so. This Court also afforded defendant an opportunity to conciliate. Thus, defendant had a full and fair opportunity to

engage in whatever informal methods of conciliation it desired.

This Court is unwilling to penalize the plaintiff by dismissing his lawsuit for failure to strictly adhere to the requirements of §626, when such failure was specifically caused by the willful, illegal acts of defendant. As the Court said in *Skoglund v. Singer Company*, 403 F.Supp. 795 (D.N.H. 1975), when faced with a similar situation:

> This case does not concern a procedural default due to a lay person's lack of knowledge in the intricacies of the law; it is even more basic. Plaintiff's failure to timely file . . . is due to defendant's failure to notify him of his rights as required by law. Defendant should not benefit to plaintiff's detriment by its failure to fulfill the responsibilities laid upon it by Congress. It is basic to our system of justice that one should not benefit from a wrong done to another. 403 F.Supp at 804.

ACCORDINGLY, IT IS HEREBY ORDERED:

1. This Court has jurisdiction of this action;

2. That the 180 day notice period of §626(d) of the Act is equitably tolled until April of 1979;

3. That defendant is equitably estopped from asserting the 60 day time period of §626(d) of the Act due to its own failure to comply with its statutory duty to make plaintiff aware of his rights under the Act; and

4. That there was sufficient compliance by plaintiff with the 60 day notice period of §626(d) to accomplish the statutory purpose of that section because defendant was already aware of allegations of age discrimination in its Charlotte office and defendant was afforded a full and fair opportunity to conciliate plaintiff's charge of age discrimination, both by the Department of Labor and by this Court.

May 28, 1981

/s/ James B. McMillan

James B. McMillan
United States District Court Judge

[FILED MAY 29 1981]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
NORTH CAROLINA
CHARLOTTE DIVISION

Civil Action No. C-C-79-140

WILDRED H. VANCE,

Plaintiff,

vs.

WHIRLPOOL CORPORATION,

Defendant.

JUDGMENT

This case was tried before a jury beginning on March 27, 1981, and a verdict was returned on April 2, 1981, as follows:

1. Did defendant Whirlpool fail to post and keep posted in conspicuous places upon its premises in Charlotte an age discrimination notice or notices prepared as approved by the Secretary of Labor setting forth information to employees regarding their rights under the Age Discrimination Act?

ANSWER: Yes

2. Did the plaintiff Wilfred Vance file a charge of age discrimination with the Secreatry of Labor within 180 days of retaining a lawyer or obtaining actual knowledge of his rights under the Age Discrimination in Employment Act?

ANSWER: Yes

3. Did the defendant Whirlpool Corporation refuse to conciliate with the Department of Labor concerning the plaintiff's charge of age discrimination?

ANSWER: Yes

4. Did the defendant Whirlpool Corporation, in violation of the Age Discrimination in Employment Act, discharge the plaintiff, Wilfred H. Vance, because of his age?

ANSWER: Yes

5. If so, what amount, if any, is the plaintiff entitled to recover from the defendant, Whirlpool Corporation, for loss of earnings and other benefits up to the present?

ANSWER: $47,130

6. If so, was the violation of the Age Discrimination in Employment Act by the defendant, Whirlpool Corporation willful?

ANSWER: Yes

7. (To be answered only if you have answered "no" to issue number 6):

What day was plaintiff discharged?

ANSWER: _____

Claims for equitable relief were tried to the Court simultaneously and on May 28, 1981, the Court entered an Order allowing plaintiff's motion for equitable relief.

On the basis of the foregoing, IT IS ORDERED, ADJUDGED AND DECREED:

1. That the plaintiff shall have and recover of the defendant the sum of $47,130.00 for loss of earnings up to the time of the verdict of the jury.

2. That the plaintiff shall have and recover of the defendant an additional amount of $47,130.00 as liquidated damages.

3. That the defendant shall reinstate the plaintiff as Builder Territory Manager of the Charlotte Sales Division of the defendant.

4. That from the time of the verdict of the jury until the plaintiff is reinstated, the defendant shall pay the plaintiff the same salary, commission, benefits and emoluments, including increases and bonuses, as have been or are being and will be paid to other territory managers of the Builders Department with no less seniority than the plaintiff, less such amounts as plaintiff earns, with reasonable diligence, during that period.

5. That the plaintiff shall recover an attorneys' fee of $35,000 to be paid to the firm of DeLaney, Millette, DeArmon & McKnight, P.A.

6. That the plaintiff shall recover his costs of this action and also expenses incurred by the law firm of DeLaney, Millette, DeArmon & McKnight, P.A. in the sum of $105.84.

7. The plaintiff shall recover interest on this judgment at the maximum rate allowed under the North Carolina law on all items of damages, attorneys' fees, costs and expenses from the date of the judgment.

8. The defendant is ordered to pay to Dr. Nilo A. Niccolai an expert witness fee in the sum of $125.00 for his services as an expert witness in this case.

This 28 day of May, 1981.

/s/ James B. McMillan
James B. McMillan
United States District Judge